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In The

Supreme Court of the United States

October Term, 1976

Docket No. 76-1328

ANDREW CATAPANO CO., INC. and GROW CONSTRUCTION CO., INC., a Joint Venture Comprising ANDREW CATAPANO CO., INC., GROW CONSTRUCTION CO., INC. and ALBERT COZZI,

Petitioner-Appellant,

v.

NEW YORK CITY FINANCE ADMINISTRATION,

Respondent-Respondent.

On Appeal from The Court of Appeals of
The State of New York

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

Andrew Catapano Co., Inc. and Grow Construction Co., Inc., a Joint Venture Comprising Andrew Catapano Co., Inc., Grow Construction Co., Inc. and Albert Cozzi,

Petitioner-Appellant,

v.

New York City Finance Administration,

Respondent-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK
JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is as yet unreported but is set forth in the Appendix beginning at page A1 at the end of this

Jurisdictional Statement.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1257(2), this being an appeal which draws into question the validify of certain provisions of the New York City Unincorporated Business Income Tax Law and the other related statutes, on the ground that it is repugnant to the Constitution of the United States. The aforementioned provisions are set forth under Constitutional and Statutory Provisions Involved, infra.

The Court of Appeals of the State of New York rejected Appellant's challenge to the constitutionality of the aforementioned statutory provisions and this matter is appropriately brought to this Court by appeal.

In the event that this Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C.A. §2103.

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the Constitution of the United States.

The New York City's Unincoporated Business Income Tax here involved was authorized by New York State L. 1966, Ch. 772, §2, as follows:

> "§2. Notwithstanding any provision of law to the contrary, any city having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing for any such city a tax on unincorporated businesses. The terms of such local law shall be, substantially, as follows:"

The Enabling Act then sets forth a model local law.

The New York City's Unincorporated Business Income Tax has been imposed since 1966 by Title S, Chapter 46, of the New York City Administrative Code and follows the model law. During the period here involved, the local tax law contained the following pertinent provisions (Admin. Code, Ch. 46, Tit.S):

> "§S46-1.0 Meaning of terms. (a) General.- Unless a different meaning is clearly required, any terms used in the title shall have the same meaning as when used

in a comparable context in the laws of the United States relating to federal income taxes, and any reference in this title to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred fifty-four, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same are included in this title as an appendix * * *."

"§S46-3.0 Imposition of tax. (a) General.-A tax at the rate of four per cent is hereby imposed for each taxable year, beginning with taxable years ending after January first, nineteen hundred sixty-six, on the unincorporated business taxable income of every unincorporated business wholly or partly carried on within the city. This tax shall be in addition to any other taxes imposed.

* * * "

"§S46-4.0 Unincorporated business taxable income. The unincorporated business taxable income of an unincorporated business shall be the excess of its unincorporated business gross income over its unincorporated business deductions, allocated to the city, less the amount of:

(1) Its deductions under section S46-8.0 not subject to allocation; and

(2) Its unincorporated business exemptions under section S46-9.0."

"§S46-5.0 Unincorporated business gross income. (a) General.- Unincorporated business gross income of an unincorporated business means the sum of the items of income and gain of the business, of whatever kind and in whatever form paid includible in gross income for the taxable year for federal income tax purposes, including income and gain from any property employed in the business, or from liquidation of the business, or from liquidation of the business, or from collection of installment obligations

of the business, with the modifications specified in this section.

* * *"

"§S46-6.0 Unincorporated business deductions. The unincorporated business deductions of an unincorporated business means the items of loss and deduction directly connected with or incurred in the conduct of the business, which are allowable for federal income tax purposes for the taxable year (including losses and deductions connected with any property employed in the business), with the following modifications:

* * *"

"§S46-17.0 Accounting periods and methods.

* * *

(b) Accounting methods.- A taxpayer's method of accounting under this title shall be the same as the taxpayer's method of accounting for federal

income tax purposes. In the absence of any method of accounting for federal income tax purposes, unincorporated business taxable income shall be computed under such method as in the opinion of the director of finance clearly reflects income.

(c) Change of accounting period or method.- (1) If a taxpayer's taxable year or method of accounting is changed for federal income tax purposes, the taxable year or method of accounting for purposes of this title shall be similarly changed.

* * *

The New York City's General Business and Financial Tax measured by gross receipts, which was in effect prior to 1966, was authorized by former Article 2-B of the General City Law. It provided, in part, the following (Gen. City L., §24a):

> "Notwithstanding any provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend

local laws imposing in any such city a tax (a) upon persons carrying on or exercising for gain or profit within such city, any trade, business, * * * or commercial activity, * * * measured by the gross receipts from such activities carried on * * * within the city * * *."

It required that every local tax law enacted thereunder be substantially the same as the model local law contained therein. Pursuant to this enabling act, the City enacted local laws which imposed the tax in substantially the same terms as the model law. For the years 1963, 1964 and 1965, the local tax law was contained in Title B, Chapter 46, of the New York City Administrative Code. It provided in part as follows (Adm. Code, Ch. 46, Tit. B):

"§B46-2.0 Imposition of tax

* * *

(2) For the privilege of carrying on or exercising for gain or profit within the city any trade, business * * * or commercial activity * * * for each of the periods of one year, or any part thereof, within the period commencing with July first, nineteen hundred fifty-nine, and ending on June thirtieth, nineteen hundred sixty-one,

every person shall pay an excise tax which shall be equal to two-fifths of one per centum upon all receipts in excess of ten thousand dollars * * *.

* * *

(4) For any of the privileges specified in paragragh (2) during the calendar year nineteen hundred sixty-two, or any part thereof, and each subsequent calendar year, or any part thereof, every person shall pay an excise tax at the same rate and computed in the same manner as provided in paragraph (2) hereof, measured by his gross receipts * * * during such calendar year."

The foregoing gross receipts tax was terminated as of December 31, 1965, by New York State L. 1966, ch. 772, § 4, which provided as follows:

"§4. Any tax imposed by a local law adopted pursuant to article two-B of the general city law * * * shall not be applicable for any year commencing with the year nineteen

hundred sixty-six, in which the taxes authorized by this act are imposed by local laws and are operative; * * *. Any tax or estimated tax paid under such a local law for a year in which such tax law is inapplicable by reason of this section shall be refunded by the local officer administering such tax * * * such local officer may, in his discretion, grant * * *, in lieu of the actual refund, a credit certificate in the refund amount. Such credit certificate shall be accepted by the director of finance as payments toward any tax or estimated tax required to be paid under any local law adopted pursuant to this act."

As the New York City Unincorporated Business Income Tax was authorized by Chapter 772 of the Laws of 1966 and that tax was imposed and operative for 1966 (L.L. 22 of 1966), the gross receipts tax was no longer applicable.

Also involved in this case is the New York Tax Law §1231, which provides:

> "Except as expressly otherwise provided in this article, nothing in this article shall limit or prevent the imposition of

> a tax of gross income or a tax on gross receipts of persons, firms and corporations doing business in any city with a population of one million or more. No such person, firm or corporation, however, shall be subject to the imposition under the provisions of this article of more than one tax by any such city on gross income or gross receipts for the privilege of doing business.

Questions Presented

Do the provisions of the New York City Unincorporated Business Income Tax Law and other related statutes, set forth in the Constitutional and Statutory Provisions Involved, supra, which, in effect, imposed a double tax on the Appellant violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

STATEMENT

The Andrew Catapano Co., Inc., the Grow Construction Co., Inc., and Albert Cozzi (hereinafter the "Appellant") entered into a joint venture. The Appellant was engaged by the City of New York to construct an intercepting sewer system in the vicinity of South Street in the Borough of Manhattan. The Appellant was hired in 1962 and the job was completed in 1967. The Appellant was paid an additional sum from the City of New York in 1968 to settle a claim for a change in method.

For Federal and State income tax purposes, the Appellant chose the completed contract method of accounting. The choice of alternative methods of accounting was left to the taxpayer's discretion. Under this system, no income is recognized during the course of a project until such time that the project is completed. Therefore, the revenue and expenses of a job that takes five years to complete will be computed for income tax purposes only in the fifth year. This system is contrasted to the percentage of completion method of accounting. Under the latter system, revenue and expenses are computed for income tax purposes on an annual basis according to the percentage of work finished during that year. Therefore, five separate income tax returns would be filed for a project that takes five years to complete.

Until 1966, the City of New York imposed a Gross Receipts Tax on unincorporated businesses such as the Appellant's. In 1966, the Gross Receipts Tax was repealed and replaced by the Unincorporated Business Income Tax. The effective date of the latter tax is January 1, 1966 and it is levied in place of, not in addition to, the Gross Receipts Tax. The Unincorporated Business Income Tax required the taxpayer to use the same accounting method employed for Federal and State Income Tax purposes. The Appellant complied with this requirement and continued to use the completed contract method.

After 1965, the Appellant became

subject to the Unincorporated Business Income Tax. This action contests the amount of tax due for the years 1967 and 1968 on income earned from the job with the City of New York.

The Appellant had paid a Gross Receipts Tax of approximately $93,000 for the years 1963, 1964 and 1965. On December 31, 1965, the job for the City of New York was over 90% complete.

The Appellant was adjudged to be deficient in the amount of $74,075.32 (including interest) by the Respondent, New York City Finance Administration (hereinafter the "Respondent"). This determination was made following a series of hearings held in connection with the Appellant's application to the Respondent to set aside the assessment.

The Appellant did not contest the validity of the calculations, only the right of the Respondent to assess a tax against it.

The Appellant paid approximately $93,000 in Gross Receipts Taxes for the years 1963, 1964 and 1965. This amount would have been paid whether the Appellant employed the completed contract or the percentage of completion method of accounting. However, because the Appellant chose to use the former method (a choice made at least as early as 1963), it is assessed to be deficient in the amount of $74,075.32 for the years 1967 and 1968 for its Unincorporated Business Income Tax. If the Appellant had chosen to use

the percentage of completion method, its tax assessment for the years 1967 and 1968 would be approximately $5,000 to $7,000.

The Appellant respectfully contends that the present assessment is a double tax and is invalid because it is imposed without authority and in violation of the due process and equal protection clauses of the United States Constitution.

How the Federal Questions Were Raised and Decided Below

After the Respondent assessed the tax deficiency against the Appellant, the Appellant pursued and exhausted his administrative remedies. The Appellant then petitioned for judicial review of the Respondent's determination pursuant to the New York Civil Practice Law and Rules, Article 78. Appellant ventilated his constitutional claims involved herein, as well as claims under the Constitution of the State of New York.

The Appellant's petition to review the Respondent's determination was denied by the Appellate Division, First Department of the Supreme Court of the State of New York. Thereafter, Appellant brought a timely appeal to the Court of Appeals of the State of New York.

The Court of Appeals of the State of New York affirmed the judgment below and squarely rejected those constitutional claims of the Appellant advanced herein.

The Federal Questions Are Substantial

Point I

The Respondent Does Not Have the Power to Impose a Double Tax on the Appellant and Any Effort to Do So is Invalid and In Violation of the Due Process Clause of the United States Constitution.

(a) The $74,075.32 Deficiency Assessment is a Double Tax.

The Respondent's assessment of a $74,075.32 deficiency for the years 1967 and 1968 against the Appellant constitutes an effort to exact a double tax against it. The Appellant has paid a Gross Receipts Tax (hereinafter "G.R.T.") of approximately $93,000 for the years 1963, 1964 and 1965. The Appellant is now asked to pay an Unincorporated Business Income Tax (hereinafter "U.B.I.T.") on the same income on which it has previously paid the G.R.T.

The U.B.I.T. replaced the G.R.T. when it became effective on January 1, 1966. The former was levied in place of and not in addition to the latter. This was pointed out by the then New York City Mayor, John Lindsay, in his memorandum explaining the proposed unincorporated business income tax. See Prentice-Hall, State and Local-Taxes, Vol. IV, ¶ 87,207[3].

It has been said:

> "In order to constitute double taxation in the objectionable or prohibited sense the same property must be taxed twice when it should be taxed but once; both taxes must be imposed on the same property or subject matter, for the same purpose by the same state, government or taxing authority, within the same jurisdiction or taxing district...and they must be of the same kind or character of tax." 84 C.J.S., Taxation §39.

The G.R.T. and U.B.I.T. are imposed on the same subject matter (i.e., the proceeds of the Appellant's business[1]) for the same purpose (i.e., to raise revenue[2]) by the same government (i.e., the City of New York, acting under the power delegated to it by the State), and within the same jurisdiction (i.e., the City of New York). That the G.R.T. and U.B.I.T. are of the

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[1] That the G.R.T. taxes receipts and the U.B.I.T. taxes net income was not viewed as a distinguishing point by the New York State Legislature. See subpoint (b), infra. A tax on net income is, in fact, a tax on gross receipts, except that there are allowable deductions.

[2] The U.B.I.T. had the further purpose of alleviating the inadequacies of the G.R.T. See Point II, infra.

same kind or character is shown by the fact that the U.B.I.T. was intended to replace the G.R.T.

The Appellant is impressed into this position by the New York City Special Taxes Enabling Act (L. 1966, Ch. 772 which states:

> "The taxpayer's method of accounting under this title shall be the same as the taxpayer's method of accounting for Federal Income tax purposes." Id. §121(b).

This provision parallels the same requirement in the New York State Unincorporated Business Income Tax (Art. 23), New York Tax Law, §721(b).

The Appellant is forced to pay the double tax because of an accounting method chosen at least three (3) years before the U.B.I.T. was ever enacted and which it was compelled to employ. If the Appellant had been allowed to use the percentage of completion method of accounting in reporting its unincorporated business income, its taxes would be approximately one-tenth of what they are now assessed to be, since only one-tenth of the project remained to be completed after December 31, 1965.

(b) The Respondent Does Not Have the Power to Impose a Double Tax On the Petitioner.

The City of New York was given the authority to enact the U.B.I.T. pursuant to section 2 of Chapter 772 of the New York Laws of 1966. The power to tax is wholly statutory. City of Rochester v. Bloss, 185 N.Y.42, 77 N.E. 794 (1906). The City's enactments must be consistent with the powers delegated to it in the enabling act.

The New York Tax Law states:

> "Except as expressly otherwise provided in this article, nothing in this Article shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any city with a population of one million or more. No such person, firm or corporation, however, shall be subject to the imposition under the provisions of this article or more than one tax by any such city on gross income or[3] gross receipts for the privilege of doing business." Tax Law, §1231.

The City of New York is not empowered to impose more than one tax on the gross income or gross receipts of the Appellant's business. The Appellant has paid the G.R.T. for the years 1963, 1964 and 1965. The Appellant is now being asked to pay the U.B.I.T. on the same monies. This action by the Respondent violates the Tax Law, §1231.

The Court of Appeals of the State of New York held that:

> "...section 1231 of the Tax Law did not bar the enactment of the Unincorporated Business Income Tax. It is sufficient to note that that section deals only with taxes based on gross income or gross receipts whereas the instant tax is based on net income." A2, infra.

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[3] The word "or" can be construed as an inclusive "or" (and/or) or an exclusive "or" (either/or). The Court, under New York law should construe it most favorably for the taxpayer. Society of Plastics Industry, Inc. vs City of New York, infra, and Schapiro vs. City of New York, infra.

Appellant submits that this distinction offered by the Court of Appeals is without substance. Since net income is gross income with certain allowable deductions, it is improper to use the distinction between gross and net income as a basis for allowing the double taxation of the Appellant to occur in this instance and Appellant submits that allowing this to happen constitutes a taking of property without due process of law.

(c) The Double Tax Imposed by the Respondent on the Appellant is Invalid and an Unconstitutional Taxing of Property Without Due Process of Law.

The New York State Senate and Assembly are entrusted with the legislative power of the State. New York Constitution, Art. III, §1. The taxing power comes within this domain and it is exclusive. United States Steel Corp. v. Gerosa, 7 N.Y.2d 454, 166 N.E.2d 489, 199 N.Y.S.2d 475 (1960). Therefore, the power of a municipality to tax is dependent on that power being delegated to it by the Legislature. The Respondent has exceeded its authority by imposing the double tax on the Appellant under the U.B.I.T. Any action of a municipality which exceeds the power delegated to it in the enabling act is invalid. United States Steel Corp. vs. Gerosa, supra. Any attempt by a municipality to exact a tax which it has no power to impose is an unconstitutional taking of property without due process of law. United States Steel Corp. v.

Gerosa, supra, and Society of Plastics Industry, Inc. v. City of New York, 68 Misc.2d 366, N.Y.S.2d 788 (Sup.Ct. N.Y. Co., 1971). See, also United States Constitution, Amend. XIV.

Point II

The Respondent's Attempt to Impose a Double Tax on the Appellant is Inconsistent With the Legislative Intent in Delegating the Taxing Power to the City of New York and Is, Therefore, Violative of the Equal Protection Clause of the United States Constitution.

The present New York State Unincorporated Business Income Tax (Tax Law, Art. 23) replaces an earlier unincorporated business tax law (Tax Law, Art. 16-A). Referring to the earlier statute, the New York Court of Appeals has stated:

> "The reports mentioned above and the debates during the Legislature's consideration of the measure indicate that the legislative purpose was not only to create a new source of revenue but also to lay a tax upon various types of non-corporate enterprises competing with corporations in this State.... See, Legislative Document [1932], Vol. 18, No. 77, pp. 183, 184." People ex rel. Tower v. State Tax Commission, 282 N.Y. 407, 409, 26 N.E.2d 955, 956 (1940).

The Tower decision was cited by another court when it found the same legislative intent for enacting the contemporary tax statute. Fleigler v. City of New York, 72 Misc.2d 896, 341 N.Y.S.2d 869 (Sup. Ct., N.Y. Co., 1972).

The New York State Legislature has never expressed an intention to impose a double tax on any unincorporated business using any method of accounting. Furthermore, the Legislative has never expressed an intention to impose a double tax on those unincorporated businesses using the completed contract method of accounting while exacting only a single tax from those unincorporated businesses using the percentage of completion method. In fact, the legislative intent is clearly against imposing such a double tax, whether discriminatory or not.

In passing the enabling act, the Legislature stipulated that the City of New York follow the State Unincorporated Business Income Tax as a model. L. 1966, Ch. 772, §2. The State law includes a grandfather provision to avoid taking monies that had been taxed under the preceding law. The Tax Law, §705(c) states:

> "There shall be subtracted from federal gross income of the business the following items attributable to the business:
>
> ...
>
> '(4) The amout necessary to

> to prevent the taxation under this article of any amount of income or gain which was properly included in income or gain of the taxpayer under Article 16-A."

The Federal government has a similar provision allowing for an equitable transition from the revenue raising measures of the 1939 law to similar measures in the 1954 law. 26 U.S.C. §7852(c) states:

> "Except as otherwise distinctly expressed or manifestly intended, the same items (whether of income, deduction, credit or otherwise) shall not be taken into account both in computing a tax under subtitle A of this title and a tax under Chapter 1 or 2 of the Internal Revenue Code of 1939."

The Federal Government had expressed a clear intention to avoid double taxation while effecting a smooth transition from one revenue-raising law to the new tax law that replaced it. This Court should look to this intention as a guide in construing the State tax statutes. Where the Federal government has acted in a particular field of taxation, the full import and all implications of that act are controlling on the State. In Re Del Drago's Estate, 287 N.Y. 61, 38 N.E.2d 131, rev.

on other grounds, 317 U.S. 95, rearg. denied, 287 N.Y. 764, 40 N.E.2d 764 (1941). As noted above, Point I, supra, the New York State Tax Law itself specifically forbade the taxation of both gross receipts and gross income. Tax Law, §1231.

The Appellant does not contend that there exists a constitutional provision prohibiting double taxation. In New York, the double taxation of a joint venture and a partnership that was a party to the joint venture has been held valid. Lowitz v. Graves, 261 App. Div. 715, 27 N.Y.S.2d 168, aff'd 287 N.Y. 613, 39 N.E.2d 260 (1941). But here the joint venture itself is being taxed twice. The Supreme Court of the United States has held:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system [of taxation] be shown to bear some rationale relationship to legitimate state purposes." San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973).

Similarly, the New York courts have held:

> "While it may not be successfully contended that

> the Legislature lacks the power to impose, what is called double taxation, such intention on the part of the Legislature must be clearly and distinctly expressed, it may not be inferred, and every presumption is against it." Socony Vacuum-Oil Co. v. City of New York, 247 App. Div. 163, 287 N.Y.S. 288, 291 (1st Dept., 1936).

The Court should not assume the burden of validating a double taxation when there is no clear expression of a legislative intent to impose one. Royal Bank of Canada v. Loughman, 226 App. Div. 593, 236 N.Y.S. 110, aff'd. 254 N.Y. 512, 173 N.E. 844 (1929).

Discriminatory taxes have been validated when levied in accordance with a legitimate state purpose. Thus in Madden v. Kentucky, 309 U.S. 83 (1939), a tax on out-of-state bank accounts five times the rate imposed on in-state accounts was validated because a State has a legitimate interest in encouraging its citizens to support state-chartered banks. In Rapid Transit Co. v. New York, 303 U.S. 573 (1938), the Court upheld an excise tax levied on public utilities, but not on other businesses, because of the special privileges accorded public utilities and the Legislature's desire to avoid allowing the utilities to accrue excessive profits. On similar grounds, a tax discriminating

between corporate and individual personality has been upheld. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, reh.-den. 411 U.S. 910 (1973). See, also, Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1958). And in Lawrence v. State Tax Commission, 286 U.S. 276 (1932), a tax on corporations and not on individuals was supported for another reason in addition to the State's desire to neutralize the advantage accorded businesses functioning as corporations. The Court stated:

> "Apart from other considerations which may have led to the present legislation as an integral part of the state system of taxation of the income of corporations, one which affords a rationale basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation of the same interest in corporate income, by taxing either the income of the corporation or the dividends of its shareholders, but not both.... In the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed, and not the corporation." Id. at p. 284.

As shown above, the New York State Legislature has expressed an intention to avoid the levy of double taxes. Taxing both the gross receipts and unincorporated business income of the Appellant is analogous to taxing both corporate income and the shareholders' dividends. There are no special privileges accorded those unincorporated businesses that use the completed contract method of accounting that would support taxing them twice while taxing but once the proceeds of those businesses using the percentage of completion method. Nor can one induce an intention to cause a shift from one method to the other analogous to the legislative intent in Madden, supra, to induce a shift in businesses using the corporate form to business using other organizational forms. The Appellant was required to use the completed contract method by the provisions of the U.B.I.T. Its choice of accounting method was made at least three years before the U.B.I.T. took effect. The choice was made without the Appellant being able to anticipate the effect the enactment of the U.B.I.T. would have on its tax status, since the U.B.I.T. was not even known to the Appellant when said choice was made. There is no indication of a legislative intent on the part of the City to induce a switch from one accounting method to another, nor would the U.B.I.T. have been an effective way to achieve that purpose if it had existed. Even if the Appellant had been induced to change to a short-term accounting method, it would be free to switch back to its preferred method once those projects were terminated

which were in progress in 1966 and on which the G.R.T. had been paid. All projects started after 1966 would no longer be subject to the G.R.T. and the Appellant could employ the accounting method he has elected without the threat of being subjected to both the G.R.T. and U.B.I.T.,to which it is now being subjected.

Conversely, when the effect of the tax is found to be opposed to the intention of the legislature in enacting it, that tax will be invalidated. In Society of Plastics Industry, Inc. v. City of New York, supra, the State enabled the City to tax the sale of containers made of paperboard, fiber, glass, metal, or plastic. Tax credits were to be allowed if containers were recycled. The purpose was found to be the encouragement of recycling. The City taxed plastic containers only. The Court determined that the only purpose that could be served was to induce a switch from the use of plastic containers to containers made of other materials. Since the City tax did not meet the need and purpose of the Legislature, it was invalidated. Here, the double tax bears no relation whatsoever to any expressed legislative intention and, in fact, defeats the purpose of the Legislature to avoid double taxation.

The Appellant respectfully contends that the failure on the part of the City of New York to include a provision to avoid double taxation resulting from the transition from the G.R.T. to the U.B.I.T. was an inadvertent mistake. While it is

not the role of the courts to legislate, a court can read into a law a clause inadvertently omitted to prevent an unreasonable, unconstitutional result. In Re Stockwell, 210 App. Div. 753, 206 N.Y.S. 834 (2d Dept., 1924). The Supreme Court of the United States has recognized that inadvertent mistakes can lead to violations of the Equal Protection Clause. When this occurred, the tax was held invalid. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

A tax that bears no rationale relationship to a legitimate state purpose and, in fact,defeats that purpose is violative of the Equal Protection Clause. San Antonio School District v. Rodriquez, supra. See, also, United States Constitution, Amend. XIV.

Point III

The Respondent's Attempt to Impose a Double Tax on the Appellant Indiviously Discriminates Against Appellant and Is, Therefore, Violative of the Equal Protection Clause of the United States Constitution.

Under the U.B.I.T. only those unincorporated businesses that employ the completed contract method of accounting are being forced to pay a double tax on their proceeds which accrued while the G.R.T. was in force. The Appellant is a victim of this discriminatory effect.

The Supreme Court of the United

States has held:

> "The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Allied Stores of Ohio, Inc.v. Bowers, supra, at p. 527.
>
> "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy." Id. at p. 528.

It has been shown above (Point II, supra) that the Respondent's efforts to levy a double tax on the Appellant is not in accord with any state policy, and is, in fact, contrary to the stated intention of the Legislature.

As to whether a State's distinction between classes is reasonable, the Court has said:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat

> one class of individuals or entities difference from the others. The test is whether the difference in treatment is an indivious discrimination." Lehnhausen v. Lake Shore Auto Parts Co., supra, at p. 359.

Tax classifications that rest on distinctions of fact are valid. Brown-Forman Co. v. Kentucky, 217 U.S. 563 (1910). On this basis, the distinctions between in-state and out-of-state bank accounts (Madden v. Kentucky, supra), public utilities and other businesess (Rapid Transit Co v. New York, supra), and corporations and other business forms (Lehnhausen v. Lake Shore Auto Parts Co., supra), have been validated.

However, those in the same tax classification must be treated equally. Hopkins v. Southern California Telephone Co., 275 U.S. 393 (1927). The State of New York has also recognized the proposition that those similarly situated must be treated equally. People ex. rel. Moffett v. Bates, 276 App. Div. 38, 93 N.Y.S.2d 313, aff'd. 301 N.Y. 597, 93 N.E.2d 494, cert.den. 340 U.S. 864 (1949). It is irrelevant whether the alleged unconstitutional tax is excessively burdensome. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, reh.den. 295 U.S. 768 (1935).

Upon examining the circumstances of this dispute, one immediately realizes that there has never been an attempt to classify businesses by their accounting

method for tax purposes. The New York Legislature has distinguished the income of unincorporated businesses from the income of corporations (New York Tax Law, Art. 9) and individuals (New York Tax Law, Art.22). As far as the U.B.I.T. is concerned, the only requirement for subjecting a business to a tax exaction is that it be "unincorporated" under the terms of the statute. Therefore, all unincorporated businesses must be treated equally. Hopkins vs. Southern California Telephone Co.,supra. This is not the case since those unicorporated businesses that chose to use the completed contract method of accounting before the New York City U.B.I.T. was enacted are forced to pay a double tax on the proceeds that accrued while the G.R.T. was in effect and were also reported under the U.B.I.T., while those unincorporated businesses that chose to use the percentage of completion method are not.

When the State of Virginia taxed the full income of its corporations doing business both in and out of the State and did not tax the income of its corporation that did business solely outside the State, that levy was found invalid. The Court held that some domestic corporations are being treated differently than others. Royster Guano Co. v. Virginia, supra. Such is the case with unincorporated businesses in the City of New York.

While it might be proper to discriminate in taxing out-of-state bank accounts at a higher rate than in-state bank accounts, it is doubtful that such a law would be supported if the bank accounts of different foreign states would be taxed

at different rates. A law that expressly discriminated against corporations would probably be invalid if it effectively discriminated among corporations as well. The law in question expressly discriminates against unincorporated businesses as opposed to other business organizations and it effectively discriminates among unincorporated businesses because of their accounting methods as well.

The New York Legislature might change its policy at some future time and make an express effort to empower the City to levy a double tax on those unincorporated businesses that employ the completed contract method of accounting. When the State amended the enabling act to allow the City to impose the U.B.I.T. on self-employed professionals who had previously been exempt (New York State L. 1971, Ch. 412, §1), this action was found to be valid. Schapiro v. City of New York, 32 N.Y.2d 96, 296 N.E.2d, 229, 343 N.Y.S.2d 323 (1973). In Schapiro, there was held to be no invidious discrimination because self-employed professionals were made subject to the U.B.I.T. while salaried professionals were not. The Court emphasized that self-employed professionals were taxed as entrepreneurs, while salaried professionals were not similarly situated. The self-employed professionals were being taxed on the "profits" of their unincorporated businesses, while salaried professionals were being taxed on their "wages". The Court noted an historical and intrinsic difference between "profits" and "wages" and discerned a legislative intent to group self-employed professionals

with self-employed businessmen for tax purposes. In this instance, there is no significant historical or intrinsic difference between the various accounting options from which the Appellant chose the system it now employes, and has always employed, other than the City's exploitation of that choice to exact a double taxation from the Appellant in violation of its constitutional rights which it would have been unable to do had the Appellant chosen a difference accounting method. It cannot be said that unincorporated businesses which employ the percentage of completion method, any more than the situs of a business within a tax district is valid grounds for alleging that two businesses are differently situated.

The circumstances might be changed if the Legislature had amended the enabling act to allow the City to impose a double tax on some unincorporated business and not others according to the method of accounting employed. However, the validity of such an action is not before this Court and the U.B.I.T. in its present form indiviously discriminates against the Appellant and others who chose to use the same accounting system before the U.B.I.T. was even enacted. As such, it violates the Appellant's rights under the United States Constitution, Amend. XIV.

CONCLUSION

It is respectfully submitted that Appellee's contentions with respect to the points raised herein, though accepted below, are plainly without merit. It is respectfully suggested that this Court may find this case an appropriate one for reversal without further argument.

In the alternative, it is respectfully submitted that for the foregoing reasons, probable jurisdiction should be noted. Stoaasli v. Minnesota, 283 U.S. 57 (1931).

Respectfully Submitted,

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Attorney for Appellant

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 600

In the Matter of
Andrew Catapano Co., Inc., & Grow Construction Co., Inc., a Joint Venture & c.,

Appellant,

vs.

New York City Finance Administration,

Respondents.

MEMORANDUM:

The judgment of the Appellate Division should be affirmed.

The New York City Unincorporated Business Income Tax (NYC Admin. Code, Ch. 46, Tit. S) is not unconstitutional as violative of equal protection principles. It is well settled that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (Madden v. Kentucky, 309 US 83, 88; Shapiro v. City of New York, 32 NY2d 96) and that the burden is on the one asserting the statute's constitutional infirmity to demonstrate the absence of any "conceivable state of

facts which would support" the classification (Carmichael v. Southern Coal Co., 301 US 495, 509; Lawrence v. State Tax Comm., 286 US 276). The statute will be upheld unless "the difference in treatment is an indivious discrimination" (Lehnhausen v. Lake Shore Auto Parts Co., 410 US 356, 359 reh. den. 411 US 910). The appellant has failed to meet this heavy burden.

Nor does the imposition of this tax constitute a violation of due process. By section 2 of Chapter 772 of the Laws of 1966 the Legislature empowered the City to create the tax and therefore its imposition does not constitute an unconstitutional taking of property (United States Steel Corp. v. Gerosa, 7 NY 2d 454).

Finally, section 1231 of the Tax Law did not bar the enactment of the Unincorporated Business Income Tax. It is sufficient to note that that section deals only with taxes based on gross income or gross receipts whereas the instant tax is based on net income.

* * * * * * * * * * * * * * * * * * * *

Judgment affirmed, with costs, in a memorandum. All concur.

Decided December 28, 1976

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ANDREW CATAPANO CO., INC. and
GROW CONSTRUCTION CO., INC., a
Joint Venture, Comprising ANDREW
CATAPANO CO., INC., GROW CONSTRUCTION CO.,
INC. and ALBERT COZZI,

Petitioner-Appellant,

-against-

NEW YORK CITY FINANCE ADMINISTRATION,

Respondent-Respondent.

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INDEX NO. 18168/73

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE, that the Petitioner-Appellant, relying solely upon the questions directly involving the provisions of Amendment XIV of the Constitution of the United States, appeals as of right to the Supreme Court of the United States from the decision of the Court of Appeals, dated December 28, 1976, entered in the Office of the Clerk of the Appellate Division on or about December 28, 1976, which unanimously affirmed the determination of the Respondent-Respondent herein, which petition alleged that the

Unincorporated Business Tax deficiency assessed by the Respondent-Respondent against the Petitioner-Appellant was assessed in violation of the aforementioned provisions of the Constitution of the United States; the proceeding having been transferred from the Supreme Court of New York County to the Appellate Division, First Department by order of the Supreme Court of New York County to the Appellate Division, First Department by order of the Supreme Court of New York County, entered in the Office of the Clerk of New York County on January 24, 1974. Petitioner-Appellant appeals from each and every part of the order of the Appellate Division, as well as from the whole thereof. This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

Dated: New York, N.Y.
March 22, 1977

Yours, etc.

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